STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2003
v	No. 237513 Oakland Circuit Court
NANCY MAE GRIFFORD, Defendant-Appellant.	LC No. 00-171335-FC

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals by right from her convictions by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years old). The trial court sentenced her to two concurrent terms of 6 ½ to 20 years' imprisonment. We affirm.

The trial took place on September 13 and 14, 2001. J.W., twelve years old at the time of trial, testified on direct examination as follows:[1] When he was ten years old, he and his mother were "kicked out" of their home and went to live with an adult male housemate, James Smith, in Farmington Hills. Defendant then moved into the household. Defendant "drank a lot" and "raped" him four times. The first time, J.W. was in his bedroom taking a nap after school when defendant came into the bedroom, lifted up her shirt, pulled down his pants, and "grabbed [J.W.'s] private part and put it in hers." Defendant told J.W. not to tell anyone about the incident. Another time, defendant pulled J.W. into the bathroom and licked his "private." The third time, defendant and J.W. were in the den when she "grabbed [his] private and put it in hers." The fourth time, defendant revealed part of her chest to J.W. in his bedroom and laid half of her body on his.[2]

On cross-examination, J.W. stated that in the bedroom during the first sexual incident with defendant, she merely pulled up her shirt, and no sexual penetration occurred.[3] He then stated that during the bathroom incident, defendant got on top of him and "put [his] private part

[1] As noted *infra*, J.W.'s testimony contradicted itself in several respects.

[2] Despite J.W.'s claim that defendant "raped" him four times, this last incident apparently did not involve sexual penetration.

[3] This contradicted his testimony given on direct examination.

in her," even though on direct examination he had not testified about such an act. He claimed that he had "just forgot that last part" during direct examination. He further claimed that he told no one before trial about the licking that occurred in the bathroom, but he then stated that he "could have sworn" that he did tell the police about the licking. He testified that during the incident in the den, defendant began "humping" him, and he got an erection.

J.W. testified that he told some classmates about having sex with defendant, and the classmates reported the story to the school principal. Defense counsel insinuated through his questions that J.W. had been sexually aggressive toward defendant and that J.W. had told classmates he had also had sex with a cousin and with a doll or a dog.

On redirect, J.W. stated that his "private part" went into defendant's "private part" during each of the four incidents of "rape." He then stated, "Well, the first time it didn't, but the last three times it did." He then stated, "No. I meant the last two times." Later, he stated that penetration occurred during the bathroom incident and the den incident but not during the other two incidents.

J.W.'s mother testified that she was not aware at the time of any sexual contact occurring between J.W. and defendant. She stated that she did, however, once see defendant walking out of J.W.'s room with her robe open. On cross-examination, she admitted that she could not see defendant's breasts through the open robe. She also admitted that J.W. must have been exaggerating when he testified on direct examination about a fight in which he had participated.

Frank Demers, a Farmington Hills police officer, testified that the principal of J.W.'s school contacted him about purported sexual contact between defendant and J.W. Demers stated that he received information from J.W. before trial that sexual penetration had occurred during an incident in the bathroom. He further stated that he learned of another incident of penetration but that J.W. had been unsure where exactly the additional incident of penetration took place.

Demers testified that he interviewed defendant and that she claimed that "she didn't jump [J.W.]" but that "he jumped her." According to Demers, defendant stated that "she never wanted to hurt this little boy at all" but also admitted to a sexual incident with J.W. in the den. Demers testified:

> She stated that [J.W.] was always all over her, to use her expression, touching her. She said that she just couldn't take it anymore, so she finally gave in.
>
> When I asked her to further explain how she, you know, gave in she stated that at some point she and [J.W.] became naked in the den. I asked her if [J.W.'s] penis penetrated her vagina, she stated that yes, it had. She stated that she moved up and down on [J.W.] for just a short period of time, and she stated that after the incident was over with, she told [J.W.] that both she and [J.W.] could not tell anybody about this.

According to Demers, defendant also admitted to having sex with J.W. in the bathroom but claimed that the incident during which her robe fell open was an accident.

Demers stated that defendant has a hearing impairment but that she did not appear to have any problems understanding him during the interview.

On cross-examination, Demers admitted that J.W. did not mention during his initial interviews any licking that allegedly occurred in the bathroom. Defense counsel insinuated through his questions that defendant may have been drunk when Demers interviewed her and that J.W. may have been harboring angry and resentful feelings toward defendant during the time of the incidents in question.

James Smith, called by defense counsel, testified that defendant is a severe alcoholic, that she spent a lot of time alone with J.W., that he never saw defendant having sex with J.W., and that J.W. never told him that he and defendant had been having sex. Smith further testified that J.W. "[c]onstantly" touched defendant in inappropriate places like her buttocks and breasts. He also stated that J.W. had a tendency to exaggerate, and he agreed that J.W. is "the type of kid who's crying out for attention."

Defendant declined to testify, and the jury convicted her of two counts of CSC I.

On appeal, defendant argues that she should have been given an interpreter for the deaf during her police interview and during trial. Defendant argues that at the very least, the trial court should have conducted an inquiry into her need for an interpreter. However, defendant did not raise this issue below. Accordingly, we will review the issue using a plain error analysis. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To obtain relief, defendant must demonstrate the existence of a clear or obvious error that affected the outcome of the case. *Id.*

We find no clear or obvious error. Indeed, although evidence produced at trial suggested that defendant had a below-normal hearing ability, at no time did any person indicate that defendant could not sufficiently hear the proceedings during trial or that defendant could not hear Officer Demers' questions during his interview of defendant. In fact, when directly questioned by defense counsel and by the court regarding whether she wanted to testify at trial, defendant responded appropriately to the questions. Moreover, Officer Demers specifically testified that defendant did not appear to have any problems understanding him during his interview of her. On the record before us, a remand or reversal is not warranted. *Id.*

Defendant additionally argues that her trial attorney rendered ineffective assistance of counsel by failing to address the need for an interpreter. To establish ineffective assistance of counsel, a defendant must show (1) that the performance of counsel "was below an objective standard of reasonableness under prevailing professional norms" and (2) a reasonable probability that, in the absence of counsel's error or errors, the outcome of the proceedings would have differed. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). This Court presumes effective assistance of counsel, and a defendant bears a heavy burden to overcome this presumption. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Moreover, because defendant did not raise the issue of ineffective assistance in a motion for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

The record does not establish that defendant received ineffective assistance of counsel. As noted earlier, no one indicated that defendant could not sufficiently hear the proceedings

during trial or that defendant could not hear Officer Demers' questions during his interview of defendant. Accordingly, we cannot conclude that defense counsel performed "below an objective standard of reasonableness under prevailing professional norms" in failing to inquire about the need for an interpreter. *Sabin, supra* at 659. Defendant has not sufficiently established the need for a remand or reversal.

Next, defendant argues that the jury should have been given an instruction regarding J.W.'s aggressiveness. She states in her appellate brief:

> According to [defendant] the sex acts, instigated by a precocious young child, overcame her will and her ability to resist.
>
> It is a matter of interpretation and credibility, as to whether a jury would accept this concept, that the child was forcefully irresistible, but it was necessary that they be instructed regarding the defense offered. For clarity on this point, one can hypothesize – suppose that the minor complainant is a husky fifteen year old, who overcomes a weakened, older woman by brute force, in fact committing forcible rape. Does public policy allow these circumstances to impose criminal liability on the older woman? The instant case is a variation on that scenario which Appellant contends requires clarification in the instructions to the jury, and the jury should be allowed to decide.
>
> It is the defendant's position that, in order to allow defendant to present her defense, an additional instruction is required, to inform the jury at least, that some volitional act on the part of the defendant is required; for example that the acts were for sexual gratification, or that that acts were initiated by the defendant.
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> Absent such an augmented instruction, the jury was uninformed as to how they should regard the fact that the child is the aggressor and the perpetrator; the defendant was denied her constitutional right to present a defense.

Defendant did not raise this issue below; accordingly, we will once again review the issue using a plain error analysis. *Carines, supra* at 763. We find no basis for reversal.

First, defense counsel indicated that he was "satisfied" with the court's jury instructions. This expression of satisfaction waived any objections to the instructions and extinguished any error. *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000); see also *People v Ortiz,* 249 Mich App 297, 311; 642 NW2d 417 (2002). Second, defendant provides no authority for her assertion that an additional element should be added to the crime of CSC I. See, e.g., *People v Watson,* 245 Mich App 572, 587; 629 NW2d 411 (2001) (a "[d]efendant's failure to cite any supporting legal authority constitutes an abandonment of [an] issue"). The instructions as given conformed to MCL 750.520b(1)(a), and reversal is thus unwarranted.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper